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FILED
MAY 16 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1857

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner

v.

HARRIS A. PARSON,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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OPPOSITION ON BEHALF OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI

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Dated: May 16, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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STATEMENT OF THE CASE

This action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, was filed in September, 1967, almost seventeen years ago. The plaintiff alleged that he was denied promotion to a shift foreman job at defendant's plant in Chalmette, Louisiana on grounds of race.[1] The complaint also included allegations of class-wide discrimination.

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[1] The parties are referred to herein according to their designation in the district court. The plaintiff, Harris A. Parson, is respondent on the Petition. The defendant, Kaiser Aluminum & Chem. al Corp., is the petitioner.

In May, 1974, after hearing only plaintiff's evidence, the district court dismissed the complaint under Rule 41(b) of the Federal Rules of Civil Procedure. A20.[2] In July 1978, the United States Court of Appeals for the Fifth Circuit reversed, holding that plaintiff had established a *prima facie* case both as to the individual and class claims of discrimination, and remanded for completion of the trial proceedings. 575 F.2d 1374 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979); A25. On remand, the case was assigned to a different trial judge, and, after hearing defendant's evidence for four trial days, the court entered its findings and conclusions adverse to Kaiser on all issues on August 28, 1980. 497 F. Supp. 339; A69.

A Special Master was appointed to address the individual and class remedial issues, and on February 7, 1983, the Special Master issued his report recommending that plaintiff be awarded back pay, with interest, from August 1967 until June 1982, as well as an adjustment in his pension to reflect service as a shift foreman, rather than as an hourly employee, from August 1967. A90. This recommendation was adopted by the district court in a Minute Entry filed on April 27, 1983. A104.

On May 18, 1983, the district court entered judgment as to Parson's individual claim, and certified the judgment as final under Rule 54(b) of the Federal Rules of Civil Procedure. A108.[3] On March 19, 1984, the judgment in Parson's favor was affirmed by a unanimous panel of the United States Court of Appeals for the Fifth Circuit, per Jolly, J. 727 F.2d 473; A110.

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[2] "A—" references are to the Appendix to the Petition.

[3] The remedial issues respecting the class claims are still pending in the district court.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. The Decision of the Court of Appeals That the District Court Properly Applied Controlling Legal Principles in Sustaining Parson's Individual Claim is Correct and Presents No Question Warranting the Exercise of Certiorari Jurisdiction by this Court.

Kaiser's argument is based on a hodgepodge of out-of-context quotations from various judicial statements in this case over a period of many years. Under *United States Postal Service v. Aikens*, 103 S. Ct. 1478 (1983), the correctness of the pre-1980 decisions as to whether or not plaintiff established a *prima facie* case is now irrelevant. On the other hand, the Petition virtually ignores the March 19, 1984 decision of the court of appeals, from which review is sought. Applying *Aikens*, the court of appeals found that the opinion entered by the district court in 1980 on a full trial record contained the necessary finding of intentional discrimination against plaintiff in the denial of a supervisory job. The court of appeals rejected defendant's argument that certain words or phrases in the district court opinion undercut that finding.

1. In sustaining Parson's individual claim on a full evidentiary record, the district court unequivocally found that Parson was denied promotion for reasons related to race:

> If there had been no racial overtones to be considered and taken into account in [Parson's] selection and promotion, it is more likely than not that he would have been affirmatively considered.
>
> • • • •
>
> By 1967, white employees who had considerably less seniority than Parson had been selected as shift foremen in the Metal Products Department. (Pl. Exh. 107, p. 4.) Thus, by August, 1967 (the date of Parson's second application for promotion to shift foreman), Parson would have been considered for and,

> more likely than not, subsequently promoted to the rank of foreman but for his activities above noted dealing with integration of the Kaiser facilities.

497 F.Supp. at 342, A75-A76 (para. 8, 10).[4]

In *United States Postal Service v. Aikens*, 103 S.Ct. 1478 (1983), this Court held that when both sides have presented their evidence on an issue of individual discrimination, the presumption established by *McDonnel Douglas*[5] and *Burdine*[6] "drops from the case", and the district court "must decide which party's explanation of the employer's motivation it believes." *Id.* at 1482.

The court of appeals carefully considered and properly rejected Kaiser's argument that the district court failed to resolve this question:

> The district court set forth in its findings of fact exactly what it found to be Kaiser's motive for not promoting Parson: "Parson had . . . sought to involve himself in a leadership role among the black employees at the Kaiser plant in connection with various management-based attempts to eliminate racially segregated facilities. . . ." 497 F.Supp. at 341. The district court explicitly stated that *but for* these activities "Parson would have been considered for and, more likely than not, subsequently promoted to the rank of foreman. . . ." *Id.* at 342 . . .
>
> The language of finding number ten clearly expresses the district court's finding on the ultimate issue of intent. We see no other way to read it: the district

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[4] The district court reiterated this finding in its April 27, 1983 Minute Entry, rendered subsequent to this Court's decisions in *United States Postal Service v. Aikens*, 103 S. Ct. 1478 (1983), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). A105.

[5] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[6] *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

> court obviously believed Parson's explanation of Kaiser's motivation in denying his application.

727 F.2d at 477, A116-A117 (emphasis in original).[7] This is exactly the question framed by this Court in *Aikens*.

2. Following its finding that it is more likely than not that Parson would have been promoted in the absence of racial considerations, the district court examined Kaiser's asserted defense that it was justified in applying higher standards of promotion to blacks than to whites because of its fear of the reaction of white employees to the promotion of blacks. This discussion appears in paras. 12-16 of the first section of the court's finding of fact, 497 F.Supp. at 342-343, A77-A79. The district court expressed sympathy for Kaiser's concerns, but found that Kaiser had not shown that the application of a dual discriminatory standard was "essential to recognized business goals of safety and efficiency." 497 F.Supp. at 342, A-77. As the court of appeals noted, it was in the context of rejecting this defense that the district court referred to "de facto (though unintentional) discrimination. . ."

> The district court acknowledged that the evidence before it demonstrated that Kaiser's management was making good-faith efforts to comply with the Civil Rights Act of 1964, but that these efforts were hampered by fear of racially motivated violence. The district court found that, "there is evidence of instances of de facto discrimination occasioned by timidness and vacillation resulting from fear and concern for the overall plant operations. This de facto (though unintentional) discrimination is understandable and yet unacceptable." 497 F.Supp. at 342-43. This finding is followed in the very next sen-

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[7] At trial, defense witnesses articulated various performance related reasons for Parson's rejection. On the entire record, the district court found as a fact that these reasons did not explain the denial of promotion. Kaiser has not challenged the factual findings of the district court. *See* 727 F.2d at 478, A118.

tence, by the district court's conclusion that blacks seeking promotion were required to show greater ability than whites. *Kaiser argues that this finding, and especially the use of the word "unintentional," is tantamount to a finding of absence of discrimination. We disagree. Kaiser reads the district court's findings out of context. It is clear that, after a full review of the evidence, the district judge found Kaiser to have consciously adopted a higher standard of review for foreman applications made by black employees. It is also clear that the district judge found this discriminatory policy to have been the "but-for" cause of the denial of Parson's application.* The district court's findings must be read as a response to Kaiser's contention that it was justified, because of the violent atmosphere at the Chalmette plant, in requiring black applicants to be more highly qualified than white applicants. This response has nothing to do with the factual issue of intent, as Kaiser now asserts on appeal. Rather, it addresses the question whether Kaiser had advanced a defense to liability for its deliberate decision to scrutinize black applicants more carefully than whites. The district court correctly found that Kaiser had not asserted a valid defense under Title VII. See *City of Los Angeles Department of Water* v. *Manhart*, 435 U.S. 702 (1978); *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 436 U.S. ——, 103 S.Ct. 3492 (1983).

727 F.2d at 477-48, A117-A118 (emphasis added).[8]

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[8] The same analysis applies to the district court statement, on which Kaiser relies, that Parson was not denied promotion because of "any company-based prejudice," but because of "fear that Parson's promotion would trigger a violent and prolonged (and, thus, expensive) reaction on the part of certain white, racially-motivated employees . . ." 497 F.Supp. at 342, n.2, A76, n.2. Proof of intentional discrimination does not require evidence of "company-based prejudice." The pertinent inquiry is whether the employer treated plaintiff "less favorably than others because of [his] race . . ." *U.S. Postal Service v. Aikens*, 103 S.Ct. at 1482, quoting *Furnco*

As the court of appeals found, the decision of the district court represents a proper application of the principles enunciated by this Court for the evaluation of individual claims of discrimination on a full trial record. No issue warranting the exercise of *certiorari* jurisdiction is presented.

II. The Award of Interest is in Accord with Precedent and Does Not Warrant the Exercise of Certiorari Jurisdiction.

In applying the "make whole" principle of an award of back pay under Title VII, the lower courts have been unanimous in the view that a district court has discretion to include pre-judgment interest. See, *e.g.*, *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 263 (5th Cir. 1974); *Washington v. Kroger Co.*, 671 F.2d 1072, 1078-79 (8th Cir. 1982); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 940 (10th Cir. 1979); *Taylor v. Philips Industries, Inc.*, 593 F.2d 783, 787 (7th Cir. 1979). The same rule has long been applied under the National Labor Relations Act.[9] See *Winn-Dixie Stores, Inc. v. N.L.R.B.*, 413 F.2d 1008, 1010 (5th Cir. 1969); *Reserve Supply Corp. v. N.L.R.B.*, 317 F.2d 785, 789 (2d Cir. 1963).[10] This is in accord with the principles established by this Court to govern cases where a federal stat-

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Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), and *Teamsters v. United States*, 431 U.S. 324, 335, n.15 (1977). The district court, on ample evidence, found this to be the situation in this case.

[9] This Court has noted that the back pay provisions of Title VII were modelled on the back pay provisions of the National Labor Relations Act. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769, 774-75 and n.34 (1976).

[10] The decisions of eight circuits approving the award of pre-judgment interest as a component of back pay under the National Labor Relations Act are collected in *N.L.R.B. v. Local 138*, 385 F.2d 874, 878 n.22 (2d Cir. 1967).

ute is silent on the subject of pre-judgment interest. See *Blau v. Lehman*, 368 U.S. 403, 414 (1962).[11]

The Petition provides no reason for reconsideration of this established principle.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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[11] Defendant suggets that 28 U.S.C. § 1961, which provides for post-judgment interest, precludes pre-judgment interest. As the Fifth Circuit has noted, § 1961 "has nothing to do with the question of whether pre-judgment interest shall be allowed *as part of the compensation awarded to make a party whole*," *Illinois Central R.R. v. Texas Eastern Trans. Corp.*, 551 F.2d 943, 944 (5th Cir. 1977) (emphasis in original).